No. 94-1316

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SOUTHVIEW FARM and RICHARD H. POPP,
Petitioners,
v.
CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE NEW YORK FARM BUREAU, INC. IN SUPPORT OF PETITIONER

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With the written consent of all parties given and filed with the Clerk of the Court, the American Farm Bureau Federation and the New York Farm Bureau, Inc., respectfully submit this brief as *amici curiae*.

Amici curiae, the American Farm Bureau Federation and the New York Farm Bureau, Inc., pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919

and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois and has its principal offices in Park Ridge, Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico (including the New York Farm Bureau, Inc.) and represents more than 4 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

The New York Farm Bureau, Inc. (NYFB) is a non-governmental, voluntary farm organization. It is a not-for-profit corporation which was originally organized under the "Membership Corporation Law" of New York State in 1953. NYFB's purpose is to promote, protect and represent the economic, social and educational interests of New York farmers, as well as to encourage the development and preservation of agricultural areas within the state. NYFB has a statewide membership of more than 25,000 member families in 50 counties including Wyoming County wherein the land and farming activities of this case are situated.

The American Farm Bureau Federation and the New York Farm Bureau, Inc. (hereinafter collectively referred to as "Farm Bureau") and their members have a vital interest in this case. The Court of Appeals for the Second Circuit has overridden clear Congressional intent and rewritten the Clean Water Act (CWA) so as to regulate agricultural activities as point sources rather than non-point sources of pollution. The Circuit Court expanded the scope of what constitutes a concentrated animal feeding operation as a regulated point source far beyond that intended by Congress. The Circuit Court disregarded the clear intent of Congress that, except for concentrated animal feeding operations, all other agricultural activities are to be regulated under the CWA

as non-point sources. The Circuit Court has even gone so far as to make farm machinery and implements themselves into point sources of pollution, and made the application of manure to land to fertilize crops growing thereon a point source discharge to waters of the United States.

If allowed to stand, the Circuit Court's decision will have a devastating impact on virtually every farmer and rancher in America through the imposition of an unintended, unnecessary and extremely costly industrial-type regulatory compliance burden involving additional restrictive and uneconomical farm and ranch operating practices. Under the reach of the Circuit Court's decision farmers and ranchers will have to seek federal permits for usual and customary farming activities, including the application of manure to farm fields and crop lands as fertilizer. The Circuit Court's decision is even broad enough to encompass the application of any and all fertilizers, pesticides and herbicides to agricultural fields and crop lands. The Circuit Court's decision also opens the federal courts to a myriad of CWA citizen suit actions against farmers and ranchers by individuals whose real complaints are with the usual and customary farm smells and odors that exist in the rural areas where such individuals have chosen to reside.

STATEMENT OF THE CASE

Petitioners are a dairy farm and its manager (hereinafter collectively referred to as "Southview Farm"). Southview Farm's dairy operation is located in Wyoming County, New York, and includes approximately 1,290 milking cows and 900 calves and heifers. Southview Farm's operation involves a manure collection, separation and storage system that allows Southview Farm to recycle organic nutrients through the application and spreading of manure as fertilizer on some 1,900 acres of attendant crop lands growing forage and feed for Southview Farm's dairy animals.

This case was initiated by the Respondents, a group of rural residents, in federal court through the filing of a citizen's suit under the CWA. Respondents' complaint alleged violations of the CWA and also contained state law causes of negligence, nuisance and trespass. The CWA allegations complained of manure leakage from Southview Farm's storage lagoon to surface and groundwater, and that manure applied by Southview Farm to its crop lands accumulated and ran in discrete rivulets into drainage ditches that drained into adjacent surface waters. Respondents did not allege that the Southview Farm's dairy farm was a concentrated animal feeding operation under the CWA.

Southview Farm moved unsuccessfully to dismiss Respondents' complaint and subsequently for summary judgment on grounds that Respondents failed to allege and could not show activities that constituted an illegal discharge of a pollutant from a point source into waters of the United States, all essential to the maintenance of a citizen's suit under the CWA. Southview Farm contended that their operations were a non-point source of pollution and as such not subject to a citizen's suit enforcement action. In denying Southview Farm's motions the trial court utilized a broad interpretation of what constituted a point source, relying primarily on case authority involving the channeling or collecting of surface runoff into discrete rivulets from industrial activities such as mining, and not involving agricultural activities.

The case was tried to a jury which found for Respondents on five of eleven alleged CWA discharge violations. However, the trial court, on Southview Farm's motion, overturned the jury verdict on the CWA violations. Respondents appealed to the Second Circuit Court of Appeals.

The trial court had ruled prior to the submission of the case to the jury that Southview Farm was not a con-

centrated animal feeding operation because Southview Farm grew crops on its dairy farm lands. Respondents did not appeal that ruling to the Circuit Court. Because it was not raised on appeal by the Respondents, neither Southview Farm nor Farm Bureau (which participated as *amici* before both the trial court and the appellate court) addressed the concentrated animal feeding operation issue before the Circuit Court.

Four days prior to oral arguments, the United States Environmental Protection Agency (EPA) through the Department of Justice filed an out-of-time *amicus* brief with the Circuit Court which was accepted over the objection of Southview Farm. The Circuit Court further refused to grant Southview Farm a continuance and permission to file a response to the new arguments raised by EPA relative to Southview Farm's dairy activities constituting a concentrated animal feeding operation.

The Circuit Court thereafter issued its decision which substantially adopted the position and reasoning contained in EPA's out-of-time *amicus* brief. The Circuit Court held that, because Southview Farm's operation involved more than 700 dairy animals and it did not grow crops within the area in which the animals were confined, it was a facility defined in EPA's regulations under the CWA as a concentrated animal feeding operation. The Circuit Court also held that Southview Farm's application of manure to its crop fields was a point source discharge when the manure accumulated or was picked-up in stormwater run-off and was channeled in discrete rivulets to surface waters. And, finally, the Circuit Court held that manure spreading equipment and vehicles themselves to be point sources under the CWA.

REASONS FOR GRANTING THE WRIT

The case now comes before this Court on petition for certiorari which *amici curiae*, the American Farm Bureau Federation and the New York Farm Bureau, Inc., strongly support and urge this Court to grant. The Circuit Court has seriously misconstrued the CWA and its regulation of agricultural activities. It has overturned the intent of Congress that, except for the singular activity of a concentrated animal feeding operation, agricultural activities are to be regulated as non-point sources, not as point sources.

The Circuit Court has rewritten the CWA such that every farmer and rancher in America that maintains any number of animals in a confined area can be regulated as a concentrated animal feeding operation; that every mechanical manure, fertilizer, pesticide, and herbicide applicator used by every farmer and rancher in America will be regulated as a point souce under the CWA, and that the application of manure, commercial fertilizers, pesticides, and herbicides to crop lands will be illegal discharges of a pollutant under the CWA if they find their way into any surface waters through a discrete entry point.

Virtually every farmer and rancher in the United States is affected by the Circuit Court's decision and is vitally concerned with this Court accepting this case for review and ultimately restoring Congress' intent for the regulation of agriculture as a non-point source under the CWA.

I. EXCEPT FOR CONCENTRATED ANIMAL FEEDING OPERATIONS, CONGRESS CLEARLY INTENDED THAT ALL OTHER AGRICULTURAL ACTIVITIES BE REGULATED AS NON-POINT SOURCES UNDER THE CWA

The CWA had it's origin in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-

500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* This lengthy and complicated Act represented the first serious attempt to address the nation's water pollution problems by focusing on "point source" pollution. To address point source pollution, the 1972 Amendments established the National Pollution Discharge Elimination System (NPDES) which applied effluent limitations through a federally mandated and supervised permit system. Pub. L. No. 92-500, § 403, 86 Stat. 816, 880, codified as amended at 33 U.S.C. § 1342.

"Non-point sources," on the other hand, were addressed by Congress through the Section 208 planning process which placed primary responsibility on the states. Pub. L. 92-500, § 208, 86 Stat. 816, 839, codified as amended at 33 U.S.C. § 1288. The exemption of non-point sources from the NPDES permit system was not the result of a failure to appreciate the problem on the part of the Congress or to exclude it from regulation under the CWA. To the contrary, Congress recognized that controlling non-point sources, particularly agricultural activities, was required to achieve its water quality goals.

Congress gave careful attention to agricultural activities when enacting the Federal Water Pollution Control Act. But for the singular exception of a concentrated animal feeding operation which was expressly included within the definition of a point source, Congress chose to address the problem of agricultural pollution under the non-point source control provisions of Section 208. Pub. L. No. 92-500, § 208(b)(2)(f), 86 Stat. 816, 841, codified as amended at 33 U.S.C. § 1288(b)(2)(f). The problem's magnitude, in terms of the number and variety of sources, the site specific nature of such sources, the lack of known control technologies, and the perception that many non-point problems could be addressed only through land use controls, a traditional state role, required an approach different from that given point sources under the NPDES. As Senator Bob Dole indi-

cated in his supplemental views in the Senate Report accompanying the 1972 Amendments, "A major new thrust of this bill is in the field of agricultural pollution . . . . The bill would amend the Federal Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." *See* S. Rep. No. 414, 92d Cong., 1st Sess. 39, Supplemental Views of Senator Bob Dole, *reprinted in* 1972 U.S.C.C.A.N. at 3759.

Congress has revisited and revised the Federal Water Pollution Control Act Amendments several times since 1972, including renaming it as the "Clean Water Act" in 1977. Pub. L. 95-217, sec. 2, § 518, 91 Stat. 1566. For the most part, however, the basic 1972 framework remains in place and the fact that Congress intended to continue regulating agricultural activities as non-point sources under Section 208 is evidenced by the specific revisions made in direct response to subsequent court interpretations that ran contrary to such intent. Most revealing is the revision made amending the point source definition in 1977 to exclude "return flows from irrigated agriculture." Pub. L. No. 95-217, § 33(b), 91 Stat. 1577, codified at 33 U.S.C. § 1362(14). This revision was made to override *Natural Resources Defense Council v. Train*, 393 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom.*, and *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), where permit requirements under Section 402 of the CWA were held to apply to return flows from irrigated agriculture in spite of the fact that section 208(b)(f) provided for state control plans that included a process to (i) identify, if appropriate, agriculturally and silviculturally related non-point sources of pollution, including return flows from irrigated agriculture.

In responding to these court decisions with rectifying legislation, Congress made a very clear statement as to what its intent was and is for agriculture under the CWA:

> Testimony in field hearings suggested that effluent limitations based on technological methods may not be appropriate for control of return flow pollutants and the committee determined that *these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a water-course. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).* (Emphasis added)

S. Rep. No. 95-370, 95th Cong., 1st Sess. 35, *reprinted in* 1977 U.S.C.C.A.N. at 4360.

This same non-point intent was the basis upon which Congress added the express exclusion for "agricultural stormwater discharges" from the point source definition when the CWA was amended in 1987 to provide for the comprehensive regulation of certain forms of industrial and municipal stormwater runoff. Pub. L. No. 100-4, § 503, 101 Stat. 75, codified at 33 U.S.C. § 1362(14). Congress so acted to preclude any possible misconstruction that agriculture was to be included in the municipal and industrial stormwater control program.

II. THE APPLICATION OF MANURE TO FARM LANDS THROUGH HUMAN ACTIVITY IS NOT A POINT SOURCE DISCHARGE EVEN THOUGH IT ACCUMULATES AS RUN-OFF IN NATURAL OR ARTIFICIAL CONVEYANCES AND IS CHANNELED TO AND ENTERS SURFACE WATERS AT A DISCRETE POINT

Noting that the definition of a point source under the CWA is to be broadly interpreted, the Circuit Court held that manure applied by Southview Farm to its farm lands and thereafter collected and channeled to surface waters constituted a discharge by a point source. Expanded to

its broadest extent, the Circuit Court's decision is equally applicable to the application of any fertilizer, pesticide or herbicide to agricultural lands if they collect in run-off that becomes channeled and enters surface waters through a discrete point.

The Circuit Court supported its interpretation of the CWA with authorities that involved or relied upon cases that involved activities other than agriculture, primarily mining activities. As indicated by the foregoing discussion of the special consideration and treatment accorded agriculture by Congress in enacting and amending the CWA, decisions involving the interpretation and application of the law in mining and industrial pollution cases are not applicable to agricultural activities.

In any event, the Circuit Court's broad point source interpretation ignores the clear expression of contrary intent when it overrode the court decisions holding agricultural irrigation return flows to be point sources. As Congress clearly indicated, such flows were indistinguishable from any other agricultural runoff which may or may not involve a discrete point of entry into a water course. All such agricultural sources regardless of the manner in which applied to the agricultural lands, and regardless of the discrete nature of the entry point, are to be treated and regulated under the CWA as non-point sources.

III. MANURE SPREADING VEHICLES AND EQUIPMENT ARE NOT THEMSELVES POINT SOURCES UNDER THE CWA

Relying primarily again on case authorities that involved activities other than agriculture, the Circuit Court held manure spreading vehicles are themselves point sources. The cases relied on by the Circuit Court for this decision involved the role of vehicles and equipment in the dredging and filling of wetlands under Section 404 of the CWA. 33 U.S.C. § 1344(a). Not only are such

cases inappropriate to assess the role of vehicles and equipment used in the conduct of normal farming practices, but the Circuit Court has stretched the defintion of a point source beyond its endurable limits. In the case of Southview Farm, such equipment only applied manure to farm fields and crop lands. It was later, through natural collection and channeling, that the applied manure reached any surface waters. If anything, vehicles and equipment that apply manure and other farm chemicals to agricultural crop lands and fields are instruments of non-point pollution.

IV. FARMS LIKE SOUTHVIEW FARM ARE NOT CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER THE CWA

The CWA, while generally treating agriculturally related pollution as nonpoint source pollution under Section 208, does specifically treat pollution from "concentrated animal feeding operations" as point sources. The term "concentrated animal feeding operation" is not defined under the CWA, but is found in EPA's implementing regulations, at 40 C.F.R. § 122.23(b)(3), as follows:

> "Concentrated animal feeding operation" means an "animals feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section (40 C.F.R. § 122.23(b)).

The structure of this definition requires that in order to be a "concentrated animal feeding operation", the facility must first be an "animal feeding operation". The term "animal feeding operation" is defined at 40 C.F.R. § 122.23(b)(1), which reads as follows:

> "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> > (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and

> fed or maintained for a total of 45 days or more in any 12 month period and
>
> (ii) crops, vegetation forage growth, or post harvest residues *are not sustained* in the normal growing season *over any portion* of the lot or facility. (emphasis added)

It is clear from the structure and criteria of the definitions of "concentrated animal feeding operation" (CAFO) and "animal feeding operation" (AFO), that these terms were intended to apply to the specific situation of a "feeding" operation where animals are brought together in a facility which consists *only* of a "confined area"; where the facility does *not* include actual "farm acreage" where crops are grown and where other normal farming activities are conducted; and where the facility is *not* a "farming operation" at all. The most obvious example of an AFO or CAFO facility as intended by Congress is a cattle-fattening feedlot, where animals are simply held for feeding and fattening prior to slaughter. In that situation, the facility consists of a feedlot only, with no attendant farming operation or farm acreage for the raising of crops for those animals, and where all feed inputs are brought to the facility from outside sources.

The present case is very different from the cattle fattening feedlot scenario, and represents a situation which Congress did not intend to be considered a "CAFO". Southview Farm is *not* a feedlot or a feeding operation. Southview Farm is, as its name implies, a "farm". Southview Farm's animals are not brought there temporarily for the purpose of confined feeding and fattening, but are instead there as an integral part of the overall farm operation. Being a dairy farm, the ultimate purpose or goal of the activity is the production of milk. However, the overall farming operation at Southview Farm, and at thousands of other similar dairy farms throughout the country, is much broader and includes, for example, extensive crop production. In contrast to the "no crops or

forage sustained on the premises" requirement, Southview Farm's operation includes over 2,000 acres of land, both owned and rented, where an immense volume of crops and forage is cultivated, specifically for the purpose of sustaining the dairy cows at Southview Farm.

Since the definition of "animal feeding operation" under the CAFO regulations uses the word "and" rather than "or", both the conditions of (i) and (ii) above must be satisfied in order for a facility to meet the definition of an "animal feeding operation". Southview Farm cannot be considered an "animal feeding operation", since it does not meet condition (ii) above. In contrast to condition (ii) of that definition, which requires that "crops, vegetation forage growth, or post-harvest residues are *not sustained* in the normal growing season over *any portion* of the lot or facility", Southview Farm grows or produces a vast quantity of the forage and feed for its animals directly on the acreage of the farm operation. The total projected volume of crops and forage produced on the farm property for the 1992 crop year was 25,000 tons. That amount was produced on a total of approximately 1,900 tillable acres of the total 2,200 acres of Southview's farm operation, and consisted of corn silage, alfalfa, clover and grasses.

Due to the large volume of crops and forage sustained on the farm during the normal growing season, and covering almost 90% of total farm acreage, Southview Farm clearly does not meet the definition of an "animal feeding operation", and by law cannot be held to be such an operation. Since Southview Farm cannot be considered an "animal feeding operation", and since by definition a facility must be an "animal feeding operation" in order to meet the definition of "concentrated animal feeding operation", Southview Farm, by definition and by law, *cannot* be considered a "concentrated animal feeding operation" point source under the CWA.

The Circuit Court, however, adopted the view that for the "crops/forage exception" to apply, and thereby remove the farm from the CAFO category, the crops or vegetation must be grown *within* the facility. Specifically, the Circuit Court held that "a lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility *in which* the animals are confined".

The Circuit Court has grossly misconstrued the meaning and intent of this CWA regulatory language and rendered it nonsensable. This language simply cannot mean that crops must be grown *inside* the confinement facility or feeding area. Crops or forage for large numbers of animals are never grown inside the actual structure where the animals are housed or fed. Crops for farm operations are always grown outside of the barn or place of confinement in open fields. Congress would never have intended an interpretation of the CWA which makes no common sense, or which has no practical meaning or application in the real world, or to those Congress intended to regulate. Clearly, Congress intended to except those farms where even though there may be more than seven hundred dairy animals, crops are grown over some portion of the lot or facility on which a barn or place of confinement exists.

Furthermore, the Circuit Court's interpretation is not supported by the specific language of the AFO definition, which simply does not say the vegetation or growth must be grown *within* the facility. First, the AFO definition states that an "animal feeding operation" means a lot or facility "*where* the following conditions are met". The language does not say, for instance, "within which the following conditions are met". The word "where" is much broader than a restrictive phrase such as "within which". Secondly, in part (ii) of the definition, the words *"over any portion of"* the lot or facility are used. Again,

the fact that such broad language is used works against the restrictive interpretation adopted by the Circuit Court, that the crops or forage must be grown "within" a feedlot facility in order to be removed from the CAFO category. Farm Bureau submits that the use of the terms "where" rather than "within", and the phrase "over any portion of" rather than "within", makes it very clear that the Circuit Court's interpretation of these terms is erroneous.

The Circuit Court also placed heavy emphasis on the fact that the daiy animals at Southview Farm are not pastured. The Circuit Court's focus and emphasis on whether the animals are pastured is misplaced. There is nothing in the CWA regulatory language or Congressional intent that even remotely or indirectly refers to whether or not the animals are pastured. Pasturing is simply not a factor that Congress intended regulators or courts to utilize in determining whether or not a farm operation is a CAFO.

In addition, the Court's emphasis on the pasturing issue leads to a direct conflict with the position adopted by the Circuit Court in regard to the "crops/forage exception" within the regulatory definition of an AFO. As previously indicated, the Circuit Court interpreted that language to mean that the crops must be actually grown *inside* the facility in order to remove an operation from the CAFO category. The Circuit Court's repeated emphasis on the fact that Southview Farm's cows are not pastured implies that if the cows had been pastured, they would have been "confined" in an area which sustains "vegetation forage growth", and Southview Farm would then have satisfied the crop/forage exception and would not be considered a CAFO. Therefore, the Circuit Court's decision appears to reason that when animals are pastured, the pasture areas are part of the "area of confinement", which is how crops and forage could be grown *inside* that confinement area.

Farm Bureau disagrees with this reasoning. If pasturing areas were intended to be considered part of the

"area of confinement", what would Congress have considered to be "unconfined"? Farm Bureau is not aware of any situations where dairy animals are totally unconfined and allowed to roam completely free. If the animals are "pastured", then they are no longer "confined". Therefore, although the regulations do not define the terms "lot" or "facility", its use of the terms "confined" in part (i) of the CAFO definition, and "lot or facility" in part (ii) of that definition, when interpreted in combination, must refer to the barn, barnyard, or immediate enclosure. It then follows that the "crops/forage growth" language cannot reasonably require such growth to occur *inside* the actual stucture or confinement area. The only reasonable interpretation of part (ii) of the AFO definition is that the language "crops, vegetation forage growth, or post-harvest residues . . . sustained in the normal growing season *over any portion of* the lot or facility" refers to the lot where the barn or place of confinement is located, and the rest of the "facility," including adjacent fields, which are part and parcel of the overall farming operation.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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